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No. 829

IN THE

Supreme Court of the United States

ARBIE R. MILES and ED BROWN, individually and as deacons, trustees and members of EBENEZER BAPTIST CHURCH INC., and EBENEZER BAPTIST CHURCH INC.,

Plaintiffs-Respondents,

against

ANDERSON W. WILSON, individually and as Pastor of EBENEZER BAPTIST CHURCH INC.,

Defendant-Appellant.

REPLY BRIEF FOR ANDERSON W. WILSON INDIVIDUALLY AND AS PASTOR OF THE EBENEZER BAPTIST CHURCH INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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On page 11 of the respondents' brief, there appears the nub of this case, in these words:

> "• • • In connection therewith, there is a specific finding by the Special Referee that under the proof adduced there was no ecclesiastical judicatory which could pass upon questions at issue in the instant case (1992) • • •"

Folio 1992 is part of the Referee's findings, where the Referee stated the law to be as follows:

> "These folks have the right in a religious society to decide these matters themselves, and when I say that I am not dealing with any ecclesiastical questions, for the very simple reason that the civil court never

interferes with ecclesiastical questions where there is ecclesiastical control or an ecclesiastical judicatory * * *"

Obviously, then, the Referee erred, in not realizing that in Baptist Churches, such as the Ebenezer Baptist Church, there is a highest judicatory, there is an ecclesiastical judicatory, and that is the majority of the membership (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462).

In other words, it is quite clear from the Referee's decision as he continues on in folio 1992 that if there had been, in his opinion, an ecclesiastical control or an ecclesiastical judicatory in this case, then civil courts, and particularly he, would have had no jurisdiction to excommunicate the fourteen members of the church, or to deprive them of their right to vote in an ecclesiastical matter, to wit, the dismissal of their minister, firstly from his pulpit and secondly from his lifetime contract.

On page 9 of the respondents' brief:

"* * * The Special Referee referred to some of the persons who voted: '* * * As an attempt to stuff the ballot box' (106)."

On page 10 the respondents say:

"There is no doubt that he had a pre-devised scheme in his mind to stuff the ballot box and thereby felt he could never be defeated at an election."

In that regard at folio 102, the Referee excommunicated fourteen members, and he points out that two of them had left the Ebenezer Baptist Church and had joined the Disciples of Christ, and the other ten he pointed out were children who he claimed did not have sufficient understanding, with respect to the questions voted upon. See folios 102, 103, 104 and 105.

In folio 106 the Referee refers to some of the Reverends who testified as an attempt to stuff the ballot box. Of the fourteen that he disqualified John M. Lawton and James Tate were ministers, and both of them testified that they were members of the church as did the other twelve.

I point this out because the respondents try to give the impression that fourteen ringers were brought in for the purpose of helping the minister win the election. The testimony shows and the Referee's decision shows that all fourteen were members, who the Referee excommunicated but the church never did.

The important point in this case, from the standpoint of this Court is that only the church could excommunicate these fourteen members. If these ten children didn't have sufficient understanding to decide whether or not they wanted Rev. Wilson to remain as their pastor that was for the majority of the members of the church to excommunicate these 10 children, not for the civil court.

If O. C. Barden and Connie May Barden had left the Ebenezer Baptist Church and had joined the Disciples of Christ, that was a religious question and the question as to whether they would be excommunicated and disqualified was for the church to decide. Until the church excommunicated them, they were members of the church, as appellant's brief heretofore submitted to this Court, clearly shows and it was not for the Referee to determine the ecclesiastical question.

With regard to his excommunication of the two ministers whose voting the Referee described as an attempt to stuff the ballot box, that is a very interesting question. The experts who testified on behalf of the appellant that it is common practice in the Baptist Faith for Baptist ministers to pastor one church and be members of another church stands wholly uncontradicted in the record.

Moreover, according to the experts' testimony, dismission from membership or excommunication from membership could only be by death or action of the membership (fols. 346, 347, 370, 321, 388, 269).

This testimony stand wholly uncontradicted in the record.

The experts testified that with regard to the right to vote on ecclesiastical matters, age made no difference. (fols. 322, 323, 370, 277 377).

I point this out only to show that these fourteen people testified that they were members, the books and records of the church show they were members, and not only Hiscox, but the experts' testimony was that on all ecclesiastical matters all persons who are members, could vote irrespective of age, and once a person became a member he could only lose his membership by death or by excommunication by vote of the membership.

Incidentally, it should be called to the attention of the Court that Dr. Gardner Taylor who testified as an expert on behalf of the appellant is the President of the Protestant Council of the State of New York, at the present time. It is also important to note that Reverend Dr. Sandy Ray who testified as an expert on behalf of the appellant is the President of the Empire State Baptist Convention of the State of New York, consisting of every Negro Baptist Church in the State of New York.

In arguing in favor of the constitutionality of the court's excommunicating these fourteen members, and depriving them of the right to vote, the respondents rely upon paragraph thirteeen of the stipulation of settlement. We also rely on paragraph thirteen of the stipulation, and we challenge the respondents to point out anything in paragraph thirteen of the stipulation appearing on page 7 of the respondents' brief, wherein the appellant agreed to waive any constitutional rights.

Of course, there isn't any such waiver by him whatever, and it is quite clear, that in order for a person to waive constitutional rights, that waiver must be very specifically set out in the agreement. There is no such waiver of constitutional rights whatever, contained in paragraph thirteen; and this was pointed out by the Presiding Judge Nolan in the Appellate Division in his dissenting opinion.

Moreover, the minister could only waive his own personal rights. The question of excommunicating members of the church and depriving them of the right to vote could only be waived by the majority of the congregation, the highest ecclesiastical body, who is not a party to this action, and it never waived its constitutional right to make that determination by itself for its members, particularly the fourteen that the civil court excommunicated.

On page 10, the respondents rely on the testimony of Mr. Amcham at folio 1727 that when the votes were challenged, it would be put in a separate envelope and left for the Referee to determine.

In the first place, what Mr. Amcham agreed to is not in the stipulation, as a whole or in paragraph thirteen thereof particularly (fols. 186-190).

Furthermore, an attorney is an agent. There is no proof in this record that his principal, the appellant, ever agreed to be bound by this. In any event, Mr. Amcham could possibly bind the appellant, if the proper foundation had been laid to that effect, which it was not, but certainly Mr. Amcham could not bind the Ebenezer Baptist Church, the spiritual body, not a party to this action, and who he did not represent.

In Point I, the respondents argue on page 12 that the constitutional question was not timely raised. They then go on to admit that it was raised in the answer in the Supreme Court, and it was raised as a point in the Appellate Division and in the Court of Appeals.

But then they go on to argue that the four affirmative defenses raised in the answer were waived by the stipulation of settlement entered into before the learned Special Referee.

That there is no merit to this contention appears by the very judgment appealed from which recites that the judgment is based upon

> "And an answer thereto having been interposed by Anderson W. Wilson, individually and as pastor of the Ebenezer Baptist Church Inc., sued herein as Anacin W. Wilson, individually and as pastor of the Ebenezer Baptist Church" (fols. 125 and 126),

which judgment has been affirmed by the Appellate Division and the Court of Appeals and is now before this Court, so that it is quite clear that this answer is very much part of the case as is the constitutional question raised in the affirmative defenses in the answer by the appellant.

Point II on page 13 of the respondents' brief begs the constitutional question. I have already pointed out that even the Referee's decision and judgment makes no claim that these fourteen persons were non members, but we have pointed out through the decision that they were all members who were excommunicated by the Referee for the reasons that he recited in his decision as above set forth. Not only that, but it begs the question because the constitutional question is that it was for the ecclesiastical court and not the civil court to determine whether these people were members or non members or whether they had the right to vote or not to vote.

With regard to the *Mallory* case, we have already shown that Reverend Wilson did not stipulate or waive statutory and constitutional rights and that the only one that could was the Ebenezer Baptist Church, the spiritual body,

not a party to this action. With regard to the *Moss* case the same argument is true, but in addition thereto if such an agreement had been made it would definitely be unreasonable, it would definitely be against good morals, it definitely would be against sound public policy, because it would mean that from here on in, civil courts would have to run every church and synagogue in this country, and/or tell every church and synagogue in this country how it should be run.

Obviously, if this was not against good sound policy, neither the Congress nor the Legislature of the State of New York would have constitutionally forbade such action.

It is quite elementary that individuals may not stipulate to end separation of church and state in this country.

On page 14, the respondents argue that

> "* * * Because it was found necessary to challenge numerous ballots pursuant to Section 13 of the Stipulation (188) * * *"

it is respectfully submitted that Section 13 did not envision or authorize or even mentipn the right to challenge ballots, and there is no evidence in the stipulation of settlement that the parties envisioned any challenge to the voters, because it was specifically stated in paragraph fifteen of the stipulation of settlement (fols. 186-190) that only the persons entitled to vote at a meeting of the Board of Deacons or a stated meeting of the church society or congregation shall be those members who were such on September 10th, 1957, and the records of the church, and the testimony was that all fourteen of those members who were excommunicated were members of the church on September 10, 1957.

While Reverend Wilson could not have bound the Ebenezer Baptist Church, the spiritual body, not a party to the action, in any event, as to the excommunication of

members of their right to vote, before the respondents could make the arguments that they have made with respect to waiver by Reverend Wilson, paragraph 13 would have had to contain language to the effect or similar language that if a question of challenged votes came up that a civil court could determine that question and take it away from the ecclesiastical court, but it doesn't say anything of the kind, and when the matter on motion of the respondents was referred back to Special Referee to determine these challenges, it was the duty of the Referee to refer the challenges to the ecclesiastical body, to determine.

On page 15 of the respondents' brief, it is stated:

> "And what everybody was conceding to be the church involved whether it be in a corporate form or in an unincorporated form."

That is begging the question. Reverend Wilson had no more right to bind the Ebenezer Baptist Church, the unincorporated association, not a party to the action than did the respondents, because that is governed by Sections 12 and 13 of the General Associations Law of the State of New York.

Nobody could concede the church was involved, because under the law of the State of New York the only way that you could get the church involved was to serve the president and secretary, or in the case of the Ebenezer Baptist Church the pastor or the secretary of the church, and concededly this was never done.

On page 16 the respondents quote the case of *Quicker-Berner* v. *Macy*, 250 N. Y. 341, and recites the language therefrom:

> "The court having jurisdiction of the persons and of the subject matter of the dispute passes on nothing else. • • •"

The appellant relies on this case and on this point too, for it is exactly his point, to wit, that the court had no jurisdiction of the Ebenezer Baptist Church, the unincorporated association, and it had no jurisdiction of the subject matter since it had no constitutional right to determine the qualification of these fourteen voters and excommunicate them from voting. On page 17 the respondents charged that the appellant destroyed the by-laws (fol. 119).

On page 26 of the appellant's brief submitted to this Court there has already been pointed out that in response to the Referee's question, the respondents' attorney admitted at folio 161 that

"Mr. Ferziger: There are no by-laws".

The respondents then go on to say that the appellant tampered with the church records and never produced the books and records of the church. The fact of the matter is that the appellant produced at least six big fat church record books, all of which were marked either in evidence or for identification during the trial, and they are still in the possession of the court.

At page 17 the respondents keep emphasizing that none of the 14 (who were excommunicated) were ever members of the church and were brought in as "ringers". Even the Referee made no such rash statement except as to the two ministers, and the respondents failed to cite even one folio with regard to their alleged non membership. On the other hand, in the appellant's brief twenty or more folios were cited to show that these fourteen people testified that they were members of the Ebenezer Baptist Church and that they had never been dismissed therefrom by the membership.

On page 18 the respondents argue that Judge Steinbrink did not pass upon any ecclesiastical questions in this case and then cites as authority for that proposition the

case of *Rector* v. *Melish*, 301 N. Y. 679, certiorari denied 340 U. S. 936, and they claim that this Court refused certiorari and held that no ecclesiastical questions were passed upon.

The case of *Rector* v. *Melish* was exactly the contrary. Dr. Melish had been removed by the highest ecclesiastical judicatory, to wit, Bishop DeWolfe, the presiding Bishop of Dr. Melish's church for the district covering Brooklyn and Long Island, and it was for that reason that this Court refused certiorari.

On pages 18 and 19 the respondents talk about the by-laws of the church. It is quite obvious that before the respondents went to trial they discussed the question of by-laws with their attorneys. Does it make sense that if there had in fact been by-laws in this church, that the appellant, a man of God, would deny it. Does it make sense that if there were by-laws in this church that the respondents' attorney at the very beginning of the trial would tell the Referee that there weren't any by-laws, in a direct answer to a direct question, without any reservation or qualification of any kind whatever, as the respondents now try to imply in their present brief. Moreover, each of the witnesses for the respondents described the by-laws differently insofar as its size and shape was concerned. Moreover, if there had in fact been by-laws, the evidence on the trial was that Ed Brown, one of the respondents, was away from the church for a year, before the voting took place, and if in fact, it were true, that there were by-laws, and if in fact, it were true, that if a person fails to attend three communions for three months or failed, to pay dues for six months he is automatically dismissed, Ed Brown would not have been eligible to bring this case or to have voted, and there were many other people who testified against Reverend Wilson who were in the same category as Ed Brown, but who were not challenged because there were no such by-laws.

Furthermore, such a by-law if there was one would be illegal because both Hiscox and the experts testified that under Baptist Church Law the only way that a member could be dismissed from membership was by the vote of the membership at a duly called and held meeting, and no church would pass a law, obviously, which was against the rules, regulations, customs and usages of the Baptist Church.

Furthermore, the testimony with respect to Miles, the other plaintiff, was that he hadn't attended for communion for more than three months before the vote was taken, so that he was not a member in good standing, and he had no right to bring this action if both the appellant and the respondents' counsel are to be disbelieved.

It is quite clear that the respondents were trying this case "by ear", when they saw they had no case, that their complaint on its face did not state a cause of action, it is quite obvious that somebody got up this "brilliant" idea of trying to make out a case where there wasn't any case, and after the attorney for the respondents admitted that there was no by-laws, the respondents for the first time started to try to prove there was. Furthermore, there is no proof in this record that by-laws were ever subpoenaed so that secondary evidence of same could be given. Without laying a proper foundation, it is quite clear that there was no grounds for secondary evidence.

Moreover, even if the appellant's testimony and that of their witnesses and that of the respondents' attorney was to be disbelieved, the by-laws made no reference to children or depriving children of the right to vote or depriving children of their membership in the church, there was nothing in there that was shown or proven in any alleged by-laws that said that a minister may not be the pastor of another church and the minister of the Ebenezer Baptist Church Inc., and there is no testimony that because two of the people left Ebenezer and joined other churches that they automatically gave up their membership in Ebenezer.

On the other hand the record stands uncontradicted both through Hiscox and the experts, that children of all ages, once members, were entitled to vote on ecclesiastical questions. That the only way one could be deprived of membership is by death or by vote of the membership so that the two people who left the church to join another church and the two ministers who pastored another church clearly were members, and most important of all only the ecclesiastical body could deprive these fourteen people of their membership and never did so, according to the proof in this case.

On page 19 the respondents say the learned Special Referee was absolutely correct in refusing to give any credence or honor to the votes of the children, and then on page 20 that the language to the effect that they were children of tender age was not the basis of the learned Special Referee's findings of fact.

How reckless and how careless can these respondents be, in the light of folios 102 through 105. The majority opinion in the Appellate Division and in the Court of Appeals failed to write an opinion. But Exhibit E attached to appellant's brief shows the dissenting opinion at pages 40 and 41, discusses in detail each of the fourteen excommunicated members and the reasons for their dismissal. and Presiding Justice Nolan discusses the illegality of the Referee disqualifying some of the voters because of their age, and how the respondents could be so rash and careless with the facts in the record is difficult to perceive. On page 21, the respondents point out that on page 3 of the petitioner's brief the statement is made that the petitioner is an officer of the church, the spiritual body and not an officer of the corporation. That referred to the fact that the appellant was only being sued in this case individually and as pastor of the Ebenezer Baptist Church Inc. He was never sued as chairman of the Board of Trustees, and this case involved his removal as the pastor of the spiritual body, and had no application to his corporate capacity.

On page 22, the respondents admit for the first time in this Court, because they never admitted it in the Appellate Division or in the Court of Appeals, that the Referee gave the wrong reasons for his decision, but that his decision was correct. In effect, what the respondents are saying now is that even though the Referee may have given the wrong reason for excommunicating the fourteen voters, because they were children, the decision was a correct one.

The appellant is happy to know that the respondents admit that the Referee erred and that his reasoning was wrong.

On page 22 the respondents argue that they don't have to discuss the cases cited by the appellant, and that the law expounded by those cases are not disputed. They claim that these cases, however, are not apropos.

It is quite strange, however, that the respondents have not been able to submit to this Court even one case to uphold the Referee's decision, even if his reasons are admittedly wrong.

On page 23 it is contended that the Ebenezer Baptist Church does not have a high judicatory and the right to vote in the church is controlled by by-laws. These contentions are absolutely false for the reason that the Referee himself admits that the Ebenezer Baptist Church is independent and governed by the majority of its membership in the following language at folio 107:

> "These folks had the right in the religious society to decide these matters themselves, and when I say that I am not dealing with any ecclesiastical question, for the very simple reason that civil courts never interfere with ecclesiastical questions where there is ecclesiastical control or an ecclesiastical judicatory. * * *"

That a Baptish Church has a highest ecclesiastical judicatory in the majority of its membership was held to be

the law by the Court of Appeals in *Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462.

By the same token the right to vote in the church is controlled by the majority of the membership and only by the majority of the membership, and this was so held to be the law of the State of New York in *Walker Memorial Baptist Church* v. *Saunders*, in a case very similar to the case at bar, in that it involved dismissal of a Baptist Minister of a Baptist Church.

On page 24, the respondents say:

> "As pointed out above, the church in question was not part of a system that had an appellate judicature such as the Roman Catholic Church. Each church is a separate and independent unit whether Congregational, Baptist or Jewish."

This statement shows very clearly that the respondents are either being very naive or very ignorant.

It is a matter of common knowledge to anyone having knowledge of church law, that a church is either governed by higher echelons such as in the Catholic Church, Pope, Cardinal, Archbishop, Bishop, etc., or the Protestant Episcopal Church by Presiding Bishops, or they are governed by the majority of their membership such as in the Baptist Church or the Jewish Synagogues.

In either case, the highest judicatory is either the highest ranking ecclesiastical officer in the particular church, or it is the majority of the membership. On page 25 the respondents refer to a subsequent action which is not part of this record. Clearly this is illegal and not permissible but lest the Court be misled, when the stipulation of settlement was made at folio 195, the Referee said:

> "I think the check account should be subject to counter signature by the two lawyers. They are both honorable men and I can trust them both.

Mr. Amcham: 'That is satisfactory.
Mr. Ferziger: Yes, satisfactory.'' (195, 196)

It seems that from September of 1957 until March or April of 1958 the respondents violated that stipulation by collecting the moneys every Sunday in the church by force and violence, and instead of turning it over to the board of trustees, pursuant to Section 5 of the Religious Corporations Law, they brought it to their attorneys' office each and every week, without accounting for the said moneys to the board of trustees or to the church corporation pursuant to Section 5 of the Religious Corporations Law.

As a result, an action was started pursuant to resolution of the board of trustees in the name of the Ebenezer Baptist Church Inc., against Miles and Brown for an accounting, and Referee Steinbrink himself, over the vigorous opposition of the respondents in this action, the defendants in that action appointed a Conservator, or Receiver, and when they failed to account for the moneys to the Conservator, the Conservator made an application for an accounting which was granted, by Mr. Justice Steinbrink about two months ago, shortly before dismissing the complaint, only because it was contended that the action was not authorized by the corporation, which is now the subject of an appeal in that action. Other than that stipulation we have never proceeded to enforce the judgment but have always contended that same was void and unconstitutional.

Lastly, it ought to be pointed out that at folio 91 the Referee changes the entire theory of the case and the parties to the litigation after the entire case is in. This is done in the following manner at folios 90 and 91:

"• • • the plaintiffs are Arbie R. Miles and Ed Brown, individually and as deacons, trustees and members of the Ebenezer Baptist Church and Ebenezer Baptist

Church Inc. against Anacin W. Wilson, individually and as pastor of *dash* it says Ebenezer Baptist Church Inc. I pause here to observe that there can be no pastor of a corporation. That is evidently a typographical or stenographic error."

When you read folios 90 and 91 in relation to folios 15, 16 and 17, referring to paragraphs Fifth and Sixth of the complaint, where the plaintiffs allege that the pastor was removed by the majority of the members of the corporation rather than by the members of the church which was strictly in violation of *Walker Memorial Baptist Church v. Saunders*, 285 N. Y. 462.

It is also in line with the thinking of the respondents when they say to this Court that the Ebenezer Baptist Church does not have a highest judicatory in the vote of the majority of its members.

Folios 107 and 108 show the Referee's error in this case is strictly a constitutional question because that error is solely based on the fact that the Referee didn't realize that the question of the right of church members to vote at church meetings, and the excommunication of members, and the call of and the dismissal of a pastor were all purely ecclesiastical questions.

The Referee's dilemma and his inconsistency is pointed up at folio 113 where he says:

"With reference to the body of some of the things stated by Hiscox it may well be that what he stated were his opinions which should govern these Baptist churches, each one of which is autonomous. They are on congregational lines, the same as the Protestant Episcopal Church and the same as synagogues of the Jewish faith. There is nothing above them to control or guide them, excepting the Almighty God."

With regard to the first sentence, the Referee's opinion conflicts with the Court of Appeals with regard to Hiscox. (See *Walker Memorial Baptist Church* v. *Saunders*, *supra*.)

His next sentence that Baptist churches are on congregational lines the same as the Protestant Episcopal Church is incorrect. The Protestant Episcopal Church is governed by a higher judicatory, a presiding Bishop. A Baptist Church is governed solely by the vote of the majority of its members.

With regard to the last sentence of the above quote if there is nothing above them to control or guide them, excepting the Almighty God, then by what right or power did the Referee have to determine the qualification of membership, and excommunicate these fourteen voters, especially where the appellant had won the vote before the Honest Ballot Association, if these voters had not been excommunicated. Again at folio 114 the Referee shows that the civil court will not be governed by ecclesiastical courts or ecclesiastical law as to ecclesiastical matters, or even by the Court of Appeals. For example he points out that Hiscox, Note 14 on page 79 says that all members shall have equal rights and immunities without distinction of sex, age or condition. The five experts testified to the same effect without contradiction in this record. The Court of Appeals so held in *Walker Memorial Baptist Church* case. But that did not deter the Referee. He says:

> "That may very well be with regard to worship, but I absolutely decline to hold that that applies to elections or voting such as we have had in this case, for the very simple reason, as I have already pointed out, that some of these children were of a very low order of intelligence and didn't even know the meaning of the words on the ballots on which they pretended to vote."

CONCLUSION

For all the reasons set forth in the appellant's brief in chief, and now in this reply brief, it is respectfully submitted that the petition for writ of certiorari should be in all respects granted.

Dated: New York, May 15, 1959.

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